Supreme Court, U.S.
FILED
AUG 3 2000
CLERK

No. 99-2035

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

J. PETER STAPLES
Counsel of Record
JULIANNE ROSS DAVIS
NANCY J. MORIARTY
CHERNOFF, VILHAUER,
MCCLUNG & STENZEL, LLP
Attorneys for Respondent
1600 ODS Tower
601 S.W. Second Avenue
Portland, OR 97204-3157
(503) 227-5631

161352

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING

Leatherman Tool Group, Inc. is the only Respondent in this proceeding. Respondent certifies pursuant to Supreme Court Rule 29.6 that it has no parent corporation nor are there any publicly held companies owning 10% or more of its stock.

TABLE OF CONTENTS

	Page
Parties To The Proceeding	i
Table Of Contents	ii
Table Of Cited Authorities	iii
Statement Of The Case	1
Reasons For Denying The Writ	6
I. There Is No Need For The Court To Consider The Standard Of Review	6
A. Cooper Failed to Raise the Standard of Review Before the Ninth Circuit	7
B. The Standard Has Not Been Sufficiently Considered by the Circuit Courts	9
C. The Court's Prior Decisions Support the Abuse of Discretion Standard	10
II. The Punitive Damages Awarded Were Not Grossly Excessive	12
A. Cooper's Conduct Was Reprehensible Under Gore	12
B. The Gore Guideposts Support the Award	13
Conclusion	16

TABLE OF CITED AUTHORITIES

Cases:	Page
Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	7
Auer v. Robbins, 519 U.S. 452 (1997)	7
BMW of N. America, Inc. v. Gore, 517 U.S. 559 (1996)	6, 11, 12, 13, 14, 15
Browning-Ferris Ind. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)	9, 10, 11
Central Office Tel., Inc. v. AT&T, 108 F.3d 981 (9th Cir. 1997)	8
Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997)	8
Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996)	9, 10, 11
Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)	11
Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320 (11th Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 329 (1999)	9
Lee v. Edwards, 101 F.3d 805 (2nd Cir. 1996)	9

Cited Authorities

	Page
Pa. Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998)	7
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)	10, 11, 15
Pavon v. Swift Transp. Co., 192 F.3d 902 (9th Cir. 1999)	9
Shea v. Galaxie Lumber & Constr. Co., 152 F.3d 729 (7th Cir. 1998)	9
TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)	10, 11, 13, 15, 16
United Phosphorus, Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219 (10th Cir. 2000)	9
United States v. Big D Enter., Inc., 184 F.3d 924 (8th Cir. 1999), *cert denied*, __ U.S. __, 120 S. Ct. 1419 (2000)	9
Yee v. City of Escondido, 503 U.S. 519 (1992)	9
Statutes:	
Or. Rev. Stat. § 646.642(1) (1999)	14
Or. Rev. Stat. § 646.642(3) (1999)	14
United States Constitution:	
Seventh Amendment	11

Respondent Leatherman Tool Group, Inc. ("Leatherman") respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Cooper Industries, Inc. ("Cooper").

STATEMENT OF THE CASE

Leatherman disagrees with the Statement of the Case presented by Cooper.

In the fall of 1995 Cooper decided to manufacture and sell a multipurpose tool in competition with Leatherman's well known Pocket Survival Tool ("Leatherman Tool"). Cooper intended to take 5% of Leatherman's market: "Our take at 5% of the Leatherman market should [be] in the 3M range." ER 925; Exs. 67, 72.[1] Rather than design a tool of its own, Cooper decided to copy the successful Leatherman Tool. Cooper employees were instructed to purchase a Leatherman Tool because Cooper's would be "the same size, etc." Ex. 96.

Cooper planned to launch its "ToolZall" at the National Hardware Show ("Hardware Show") in Chicago in August 1996. ER 968. The Hardware Show is the most important trade show of the year and is attended by 70,000-90,000 people. Tr. 333, 497, 886. Cooper's plan was to introduce the ToolZall with considerable fanfare as one of its major new products for the year, using large posters, color brochures, flyers, and media kits. ER 624-26. Cooper also scheduled over two dozen advertisements in national print publications from June through November 1996. ER 753; Ex. 66.

---

1. "ER" refers to the Excerpt of Record in the Ninth Circuit; "Tr." refers to the trial transcript; and "Ex." refers to trial exhibits.

Cooper began developing marketing materials in the spring of 1996. With no actual ToolZalls available to create the marketing materials, Cooper constructed a "mock-up" tool by grinding the Leatherman trademark from the handles and pliers head of a Leatherman Tool and replacing the fasteners. ER 702-06. While Cooper contends that Peter Jones, the Cooper Brand Manager overseeing the project, was unaware that the mock-up was a modified Leatherman Tool, Cooper is wrong. In his deposition, Mr. Jones reluctantly acknowledged that he knew that the mock-up ". . . may include some components from other multifunction tools," including Leatherman's. ER 656-58. Mr. Jones forwarded the mock-up to Bill Bliss, Cooper's liaison to the advertising agency, to give to the advertising agency. ER 708. The agency returned the mock-up to Mr. Jones. Ex. 100. Although the Leatherman trademark had been ground off the tool, a curved indentation remained on the pliers head where the trademark had appeared. ER 757. To remove this curved mark from a photograph of the mock-up tool, Cooper's advertising agency retouched the photograph at the direction of Mr. Jones. ER 714-15; Exs. 21-26.

Cooper used the photograph of the barely modified Leatherman Tool (the "Leatherman photograph") in all of its packaging and initial marketing materials, including brochures, catalog pages, press kits, posters and print advertisements. ER 753-56. These marketing materials were prominently displayed and widely distributed at the Hardware Show. ER 622-26. The marketing materials were given to Cooper salesmen for distribution to thousands of Cooper's customers[2] and made available to a lengthy list of Cooper's customers. ER 623-26, 632.

2. Cooper does not sell directly to consumers. Cooper's customers are vendors who sell to the public.

Cooper's use of the Leatherman photograph caused confusion. At the Hardware Show both Cooper and Leatherman were asked whether Leatherman manufactured the ToolZall for Cooper. ER 719; Tr. 98. Others were confused by Cooper's use of the Leatherman photograph, at and after the show. ER 731-41.

Cooper also used other depictions of the Leatherman Tool to portray its ToolZall. In order to show Cooper's international sales representatives a picture of the ToolZall, Mr. Jones copied a line art drawing of the Leatherman Tool. He then "whited out" the Leatherman trademark from the drawing, transferred the modified drawing to a computer disk and e-mailed it to foreign representatives as a drawing of the ToolZall. ER 640-41, 666.[3]

In September 1996, one month after the Hardware Show, Leatherman filed suit against Cooper alleging trade dress infringement, passing off, and false advertising. While Cooper promptly acknowledged that its marketing materials and packaging displayed a photograph of a modified Leatherman Tool, no immediate action was taken. Cooper waited a full two months until November 20, 1996 before recalling the misleading marketing materials from its sales personnel. ER 627-28; Ex. 217. However, Cooper made an affirmative decision not to recall the misleading materials from thousands of customers, numerous mail order catalogs and other recipients. *Id.* Cooper's memorandum to its sales personnel instructed them, in bold type, not to retrieve the marketing materials from Cooper's customers. ER 905-06; Ex. 217.

3. On October 6, 1997, Cooper stipulated to judgment on the copyright infringement claim arising from these acts.

On December 18, 1996 the district court entered an injunction prohibiting sale of the ToolZall and on December 20, 1996 Cooper stipulated to an injunction against use of the packaging and marketing materials displaying the Leatherman photograph. Cooper's decision not to recall the marketing materials resulted in thousands of violations when Cooper's customers, including mail order catalogs, used the Leatherman photograph to advertise the ToolZall. ER 627-36. Following entry of the preliminary injunction, the misleading Leatherman photograph appeared in at least four national publications. ER 1061-69.

At trial in October 1997, Tim Miller, Vice President for Sales and Marketing for Cooper's Hand Tools Division, testified that in March and April 1997 (several months after the preliminary injunction) Cooper's customers printed and distributed thousands of fliers showing the Leatherman photograph. ER 632-35. Mr. Miller also testified that there was no way of knowing how many advertisements using the misleading Leatherman photograph were still in circulation. ER 635, 636. Finally, Mr. Miller confirmed that Cooper made no initial efforts to gather these marketing materials, and did so only after many months because Leatherman insisted. ER 628-30.

Neglecting to recall the misleading marketing materials was not the only act of indifference by Cooper. In February 1997, two months after the preliminary injunction was entered, Cooper again used the Leatherman photograph, this time to create marketing materials and packaging for foreign markets. ER 636. When Leatherman promptly complained, Cooper waited until May 31, 1997 to recall the materials. ER 637-38. Mr. Miller admitted at trial that he did not know how many fliers or advertisements were distributed throughout the world showing the modified Leatherman Tool. ER 636.

After the jury awarded Leatherman $50,000 in compensatory damages[4] and $4.5 million in punitive damages, Cooper finally took remedial steps to insure that all remaining marketing materials using the Leatherman photograph were either being collected or had been destroyed. Cooper's Petition at 29a-30a. Based on these post-verdict efforts, Cooper sought to have the punitive damages award reduced. The district court declined to reduce the award, finding instead that:

> Despite the entry of an agreed preliminary injunction relative to defendant's advertising materials depicting the [Leatherman Tool] mock-up, defendant failed to take steps to actually retrieve the materials from vendors and advertisers even though it admitted that its conduct was wrong. Thus, arguably inadvertent violations of the injunction did in fact take place. It wasn't until the entry of the judgment that defendant was prompted to take the significant steps that it now has implemented to ensure that its actions are not repeated. To allow a reduction in this instance would defeat the purpose of deterrence and would unjustifiably award a defendant who the jury found deserved to be punished for its conduct.

January 7, 1998 District Court Order (Cooper's Petition at 30a-31a).

---

4. The compensatory damages were low because Leatherman brought suit immediately and a preliminary injunction was entered four months after the introduction of the ToolZall.

REASONS FOR DENYING THE WRIT

Neither question presented by Cooper merits the Court's review. Cooper never raised the standard of review question before the Ninth Circuit. The district court and the appellate court faithfully applied the standards approved by the Court. The trial court tested the constitutionality of the punitive damages award against the criteria established in *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996) ("*Gore*"), and its findings are supported by the record as presented in Leatherman's Statement of the Case. The Ninth Circuit, in accordance with the decisions of this Court, reviewed the evidence and determined that the district court did not abuse its discretion.

I.

THERE IS NO NEED FOR THE COURT TO CONSIDER THE STANDARD OF REVIEW

Cooper failed to preserve its argument that de novo is the correct standard of review. The question is newly minted for the purpose of obtaining a writ of certiorari. While the circuits have applied both de novo and abuse of discretion standards, none has considered and rejected the view of another circuit. Further, the lack of a record below makes this an inappropriate case in which to consider the question. Finally, the Ninth Circuit followed the teachings of this Court by reviewing the trial court's decision for abuse of discretion.

A. Cooper Failed to Raise the Standard of Review Before the Ninth Circuit

In a question raised for the first time in its Petition for Certiorari, Cooper argues that a trial court's determination of whether a punitive damages award violates the Due Process Clause should be reviewed de novo rather than for abuse of discretion. Since this issue was not raised below, the Ninth Circuit did not consider the question and the Court should deny Cooper's petition. *See, e.g., Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (" 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them,' " (*quoting Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970))); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (where argument was inadequately preserved in prior proceedings, Supreme Court will not consider it).

Cooper never specifically identified for the Ninth Circuit the appropriate appellate standard of review for due process considerations. Cooper's appeal to the Ninth Circuit raised three issues with respect to the award of punitive damages: (1) violation of the Oregon Constitution; (2) violation of Oregon's punitive damages statute; and (3) violation of the Due Process Clause of the United States Constitution. In its opening brief to the Ninth Circuit Cooper did not separately identify the correct standard of review for each of these punitive damages issues, but lumped the three issues together under the heading "the erroneous award of punitive damages," which in turn was listed as one of four errors of the district court that should be reviewed de novo. The only reference in Cooper's brief to a standard of review of punitive damages appeared as follows:

> The asserted errors of the District Court are reviewed under the following standards:
>
> De Novo: the erroneous grant of summary judgment . . . ; the erroneous denial of JMOL . . . ; the erroneous legal analysis underlying the attorneys' fees award . . . ; and the erroneous award of punitive damages. *Central Office Tel., Inc. v. AT&T*, 108 F.3d 981, 993 (9th Cir. 1997); *see Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1251-52 (9th Cir. 1997).[5] Cooper's Ninth Circuit Opening Brief at 2-3.

In contrast, Leatherman's brief to the Ninth Circuit separately identified the correct standard of review for each of the three punitive damages issues and stated that a district court's determination that a punitive damages award does not violate due process is reviewed for abuse of discretion. Leatherman's Brief at 5. In its discussion on the merits, Leatherman again asserted the abuse of discretion standard. Leatherman's Brief at 57. Despite Leatherman's repeated advocation of the discretionary standard, Cooper's Ninth Circuit Reply Brief and its Petition for Rehearing ignored the issue.

Thus, the Ninth Circuit was not put on notice of Cooper's now critical contention that de novo is the correct standard

5. Neither of the cases cited by Cooper in support of a de novo standard of review of an erroneous award of punitive damages directly addresses whether the appellate court reviews a due process challenge to a punitive damages award under the de novo or abuse of discretion standard. In *Central Office*, the issue was whether a punitive damages jury instruction should have been given. 108 F.3d at 993. *Eastwood*, 123 F.3d 1249, does not address punitive damages.

of review. The issue was not litigated below and no record regarding the correct standard of review was developed. As this Court has stated: "Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (citation omitted). The Petition should be denied because the standard of review was not litigated below.

B. The Standard Has Not Been Sufficiently Considered by the Circuit Courts

It is premature for the Court to consider the appropriate standard of review. While neither standard is uniformly used, none of the circuit court opinions cited by Cooper considered and rejected a standard of review adopted by another circuit.[6] In 1999, the Eleventh Circuit panel in *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, __ U.S. __, 120 S. Ct. 329 (1999), stated that

6. The Ninth Circuit case cited by Cooper, *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909 (9th Cir. 1999), simply repeated the abuse of discretion standard, citing *Browning-Ferris Ind. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The Second Circuit employed the same standard in *Lee v. Edwards*, 101 F.3d 805, 808 (2nd Cir. 1996) (*citing Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435-36 (1996)). The Seventh Circuit, in *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 736 (7th Cir. 1998), concluded that the district court did not abuse its discretion. Likewise, two of the cases cited by Cooper as affording de novo review are based upon perfunctory statements. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1229 (10th Cir. 2000); and *United States v. Big D Enter., Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999), *cert denied*, __ U.S. __, 120 S. Ct. 1419 (2000).

the appropriate standard of review was being considered as a matter of first impression. In this case the Ninth Circuit did not discuss the appropriate standard of review, but merely concluded in its memorandum opinion that the district court had not abused its discretion in upholding the punitive damages award. December 17, 1999 Memorandum (Cooper's Petition at 4a). If the Court determines that consideration of the appellate standard of review is important, it should wait for a case with a better developed record. *See Browning-Ferris*, 492 U.S. at 277.

C. The Court's Prior Decisions Support the Abuse of Discretion Standard

In *Browning-Ferris*, the Court stated that appellate courts should use an abuse of discretion standard to review a district court's decision regarding a punitive damages award. 492 U.S. at 278-79. The Court went on to state: "[W]e perceive no federal common-law standard, or compelling federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial." *Id.* at 279-80. While *Browning-Ferris* did not address due process concerns regarding punitive damages awards, later decisions of the Court confirm that decisions of the district courts should be accorded substantial deference. *Gasperini*, 518 U.S. at 434-35; *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991); and *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456-57 (1993).

In *Haslip*, the Court considered whether a punitive damages award violated the Due Process Clause. 499 U.S. at 18. The Court explained: "As long as the discretion [of the jury] is exercised within reasonable constraints, due

process is satisfied." 499 U.S. at 20. The Court then explained that the appellate court provides "an additional check on the jury's or trial court's discretion," 499 U.S. at 20-21. *See also* 499 U.S. at 24 (Scalia, J., concurring) ("the jury's discretion . . . was not undue").

In *TXO*, 509 U.S. at 456-57, the Court did not require heightened scrutiny, explaining that the jurors were impartial, that their damage award was based upon collective deliberation of the evidence and was reviewed by the trial court and an appellate court, and that such judgment was entitled to a strong presumption of validity.[7]

An abuse of discretion standard is consistent with these earlier decisions since it matches the standard for the reasonableness of a punitive damages award.[8] Violation of a state law "reasonableness" requirement does not necessarily establish that an award is so "grossly excessive" as to violate the Due Process Clause. *TXO*, 509 U.S. at 458 n.24. Only when an award can fairly be categorized as " 'grossly excessive' . . . does it enter the zone of arbitrariness that violates the Due Process Clause." *Gore*, 517 U.S. at 568. Since an award that is grossly excessive is necessarily unreasonable or excessive, it places an illogical burden upon an appellate court to require that a punitive damages award be reviewed for gross excessiveness de novo, but for excessiveness using abuse of discretion.

---

7. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 and n.10 (1994), decided the year after *TXO*, confirmed the need for judicial review of punitive damage awards, but did not suggest that such judicial review include de novo appellate review.

8. An abuse of discretion standard is also consistent with the Seventh Amendment. *Gasperini*, 518 U.S. at 435; *Browning-Ferris*, 492 U.S. at 280 n.26.

II.

THE PUNITIVE DAMAGES AWARDED WERE NOT GROSSLY EXCESSIVE

This case presents no important legal issue meriting the Court's attention. Both parties agree that *Gore*, 517 U.S. 559, governs the due process analysis, their Ninth Circuit briefs applied the *Gore* guideposts to their respective view of the facts and the district court confirmed that it applied the *Gore* guideposts. The Court should not grant Cooper's writ to apply *Gore* to the particular facts of this case.

Cooper used a touched-up photograph of Leatherman's established product to jump-start its inferior[9] competing product. Despite entry of a preliminary injunction, Cooper chose not to retrieve marketing materials using the misleading Leatherman photograph. The ratio of 90 to 1 is artificially high because Leatherman brought suit immediately and obtained a preliminary injunction. The reprehensibility of Cooper's conduct and the potential harm to Leatherman justify a large award.

A. Cooper's Conduct Was Reprehensible Under Gore

Mr. Jones knew that the mock-up was a barely modified Leatherman Tool but used a photograph of the mock-up on all ToolZall packaging and marketing materials. ER 656-58. The numerous post injunction uses of the Leatherman photograph resulted foreseeably from Cooper's deliberate decision not to retrieve the marketing materials. Cooper

9. At trial there was unrebutted testimony that the Cooper ToolZall was inferior in quality to the Leatherman Tool. ER 594.

created new marketing materials for foreign markets with the Leatherman photograph after entry of the preliminary injunction. ER 636. Omitted from Cooper's Statement of the Case is the fact of Cooper's infringement of Leatherman's copyright rights when Mr. Jones copied the drawing of the Leatherman Tool and whited out the Leatherman trademark. ER 640-41, 665-66. Cooper's characterization of the district court's description of the injunction violations as "inadvertent" is misleading.[10]

B. The Gore Guideposts Support the Award

As described above, Cooper's conduct was reprehensible and is easily distinguished from BMW's conduct in *Gore*. BMW's transgression — undisclosed presale repainting of an automobile — is quite different in character from the conduct of Cooper. Cooper passed off a photograph of Leatherman's product as its own, copied a drawing of Leatherman's product and represented it as its own, permitted others to continue to publish the misleading Leatherman photograph despite a preliminary injunction, and created new marketing materials after the injunction was entered, all in order to sell an inferior tool. These actions amount to "trickery and deceit" and are "more reprehensible than negligence." *Gore*, 517 U.S. at 576 (*citing TXO*, 509 U.S. at 462). While BMW may have been justified in claiming that it did not know it had done anything illegal, Cooper cannot take such refuge. It knew very well that what it did was wrong. Cooper stipulated to an injunction and did not appeal

10. The district court actually said "arguably inadvertent," in the midst of a paragraph describing the conduct of Cooper which led to the injunction violations. January 7, 1998 District Court Order (Cooper's Petition at 29a-30a).

the jury's finding of passing off or willfulness. The Copyright Act, the Lanham Act, and state laws against passing off and false advertising were sufficient notice to Cooper that using another's product as its own for advertising purposes was illegal. Passing off and false advertising are recognized torts at common law and Cooper must have been aware that punitive damages for these offenses are often awarded to punish and deter. Thus, Cooper had fair notice not only that its conduct could subject it to punishment, but also that severe punishment in the form of punitive damages was possible. *Gore*, 517 U.S. at 574.

The excessiveness of the punitive damages award is measured against the state's legitimate interest in punishment and deterrence. *Gore*, 517 U.S. at 568. The state has a strong interest in protecting its citizens against false advertising and passing off. Under Oregon's Unlawful Trade Practices Act ("UTPA"), anyone found to have willfully[11] used an unlawful trade practice in a suit instituted by the state may be penalized up to $25,000 per violation. Or. Rev. Stat. § 646.642(3) (1999). Although this provision is limited to suits instituted by the state, it demonstrates that serious financial penalties are possible for such conduct. Under Or. Rev. Stat. § 646.642(1) (1999), anyone who willfully violates an injunction entered pursuant to the UTPA shall be penalized $25,000 per violation.[12] These statutes also put Cooper on notice that severe penalties were possible.

---

11. The jury made a specific finding that Cooper's conduct was willful. ER 749-52.

12. Thousands of copies of the advertising materials showing the Leatherman Tool were distributed by Cooper and its vendors. ER 622-38, 640-41, 1061-69.

Cooper emphasizes the 90 to 1 ratio as if it alone makes the award grossly excessive. However, this Court has upheld punitive damage awards well in excess of 90 to 1. In *TXO*, 509 U.S. at 459, 462, the Court upheld a ratio of 526 to 1 on the basis of reprehensible conduct and potential harm. The Court has repeatedly stated that there is no "mathematical bright line" which separates merely excessive awards from grossly excessive awards. *TXO*, 509 U.S. at 458; *Haslip*, 499 U.S. at 18. Due process does not require that a punitive damages award be "reasonable," only that it not be grossly excessive. *TXO*, 509, U.S. at 458 and n.24.

The 90 to 1 ratio is misleading. The actual damages were small in comparison to the punitive damages because Leatherman acted promptly in bringing suit and obtaining a preliminary injunction, forcing Cooper to suspend sales of the ToolZall shortly after its introduction. Although Cooper characterizes the second *Gore* guidepost as relating to actual harm (Cooper Petition at 18), *Gore* refers to "actual and potential damages." *Gore*, 517 U.S. at 581-82. The potential damage to Leatherman was substantial. Untold thousands of the Leatherman photograph were distributed by Cooper's customers, mail order catalogs and magazine advertisements. ER 622-36, 640-41, 753-56, 1061-69; Tr. 333, 497, 886; Ex. 66. Cooper's use of the Leatherman photograph confused people, causing them to think that Leatherman was making the ToolZall for Cooper. ER 719, 731-741; Tr. 98. Confused customers would have purchased the inferior ToolZall because they thought it was made by Leatherman. Cooper planned to take 5% of Leatherman's business, estimated by Cooper to be $3 million. ER 925; Exs. 67, 72. Except for Leatherman's prompt action, its actual damages would have been greater, making the ratio between compensatory and punitive damages smaller. The award of $4.5 million is reasonable in relation to the potential harm from Cooper's wrongful conduct.

The punitive damages award is also reasonable in relation to Cooper's size. Cooper's total assets for 1996 were $5.9 billion. Tr. 704-05. The punitive damages award is less than 0.1% of Cooper's total assets. A lesser amount would not serve the purpose of deterrence. *See TXO*, 509 U.S. at 463.

CONCLUSION

Cooper's Petition for Certiorari is not well founded. Cooper failed to raise the standard of review issue below and now asks this Court — almost as an afterthought — to consider the issue without the benefit of an appellate court ruling. The punitive damages award received the necessary appellate review under this Court's relevant precedents. Cooper's Petition also fails on the merits, since the punitive damages award is justified by Cooper's reprehensible conduct and the potential harm to Leatherman.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. PETER STAPLES
Counsel of Record
JULIANNE ROSS DAVIS
NANCY J. MORIARTY
CHERNOFF, VILHAUER,
MCCLUNG & STENZEL, LLP
Attorneys for Respondent
1600 ODS Tower
601 S.W. Second Avenue
Portland, OR 97204-3157
(503) 227-5631